

# Decisions of the Ethiopian Federal Supreme Court Cassation Division: Imprescriptible Invalidation of Contract of Land Sale

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## Abstract

In many parts of Ethiopia, land is the base for economic resources and prestige, as provided under the Constitution of Federal Democratic Republic of Ethiopia this valuable asset is exclusively vested in the State and the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange. Concerning contractual agreement, sale of land is made imprescriptible by the decision of the Federal Supreme Court Cassation Division. The problem of this decision is that the civil code of the state provides ten years of period of limitation for invalidation of contract, made no clear exception for that matter, and the Cassation Division is empowered to only interpret the law of the state, not making a new law. Based on the problem narrated, the following questions are posed: whether the decision of the division falls under the ambit of its mandate or not and what is the practical value of the ruling? The questions are addressed via consultation of legal instruments of the state, the decisions of the cassation division and scholarly materials on the area.

**Keywords:** Land, Limitation, Cassation, Imprescriptible, Interpretation

## 1. Introduction

The Federal Supreme Court Cassation Division of Ethiopia is empowered to interpret the laws of the country (Constitution of the Federal Democratic Republic of Ethiopia, Art. 80(3)(a),(1995))<sup>1</sup>, as noted by William Baude & Stephen E. Sachs "Lawyers and judges often use 'interpretation' to find out the meaning of the laws' language and to find out its legal content" (William Baude & Stephen E. Sachs, 2017)<sup>2</sup> and comes into picture when there is ambiguity or vagueness in the law. The division decided that the ten-year period of limitation provided under the civil code cannot be applied to the cases related to sale of land, makes the issue imprescriptible. On the other hand, the civil code sated that the period of limitation can be raised against actions on invalidation of contracts (The Civil Code of Ethiopia, Art. 1845, 1960,).<sup>3</sup> This scenario reveals that the decision deviates from what is stated under the code and it might be contrary to the power given to it under the relevant law, this in turn creates legal uncertainty and feeling of insecurity to the beneficiaries of the period of limitation provided under the relevant law. Concerning statutes of limitation there are diverging views, Justice Oliver Wendell Holmes referred to it as "pure evil." (Oliver Wendell Holmes, 1897)<sup>4</sup> On the other hand, Justice Joseph Story described statutes of limitations as "wise and beneficial law[s]" (Bell v. Morrison, 1828).<sup>5</sup>

This paper is aimed at evaluating the Decisions of the Federal Supreme Court Cassation Division concerning imprescriptible invalidation of contract of land sale. On the base of this, the study will pinpoint the status of the ruling of the division on the theme, aimed to find out whether the decision of the division fall under the ambit of its mandate in

<sup>1</sup> Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 80(3)(a), Proc. No. 1, Fed. Neg. Gaz., 1<sup>st</sup> Year No. 1 see also Federal Courts Proclamation Re-Amendment Proclamation, 2005, Art. 2(4), Proc. No. 454, Fed. Neg. Gaz., year 11, no. 42

<sup>2</sup> William Baude & Stephen E. Sachs, The Law of Interpretation, Harvard Law Review, vol. 130, no. 4, 2017, pp. 1085-1086

<sup>3</sup> The Civil Code of Ethiopia, 1960, Art. 1845, Proc. No. 165, Neg. Gaz. year 19, no. 2.

<sup>4</sup> Oliver Wendell Holmes, The Path of the Law, Harv.L. REV. Vol. 10, 1897, 457, 476 () cited in Michael E. Chaplin, *Reviving Contract Claims Barred by the Statute of Limitations: An Examination of the Legal and Ethical Foundation for Revival*, Notre Dame L. Rev. Vol. 75 Issue No.4. 2000, p. 1572 Available at: <http://scholarship.law.nd.edu/ndlr/vol75/iss4/7> accessed on 29 May 2028

<sup>5</sup> Bell v. Morrison, 26 U.S. 351, 360 (1828) cited in Chaplin, cited above at note 4, p. 1572

light of possible arguments against and in favor of the decision and the practical value of the ruling. So as to reach on a conclusion, the paper employed laws of the state and decisions of the division as primary source and scholarly materials as secondary sources of data.

## 2. Overview

Whenever a question of law arises, from the rulings of subordinate courts of Ethiopia, parties are entitled to seek the review of the decision by the Federal Supreme Court Cessation Division (*hereinafter the Division*). The FDRE Constitution provides that “The Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law”(The FDRE Constitution, Art. 80(3)(a), 1995).<sup>6</sup> One of the reason, as stated by the framers of the FDRE Constitution, having cassation division at federal level is aimed at “uniform interpretation of laws throughout the country”( Minutes of the council of Representatives of the Transitional Government of Ethiopia, Unpublished, 1993).<sup>7</sup> By virtue of this constitutional power, the Division decides over cases appealed from state and federal courts.

The constitution stated that all land is owned by the state and the people, as “a common property of the Nation Nationalities of Ethiopia” (The FDRE Constitution, Art. 40(3), 1995).<sup>8</sup> Because of the peoples ownership perspective that the country follows, land is not subject to sale and any other means of exchange (The FDRE Constitution, Art. 40(3), 1995).<sup>9</sup> The rural land use and administration proclamation also followed the footstep of the supreme law. The proclamation has “assured the landholding rights to be used by the landholder for indefinite period of time and has guaranteed protection of landholders from eviction.” (Rural Land Administration and Land Use Proclamation, Art. 7(1), 2005)<sup>10</sup> Both the constitution and the proclamation guaranteed the right to get rural land free of charge for Ethiopian peasants and pastoralists(The FDRE Constitution and Rural Land Use Proclamation).<sup>11</sup> However, scholars argue that: Freehold ease transactions on land and plays a role in initiating of the peasants to invest on their land<sup>12</sup>and the system, that Ethiopia is implementing, lets the land remain without “effective owner in terms of exercising the full ownership rights” (Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero, 2017).<sup>13</sup>

The civil code under article 1845 provided that “actions for the invalidation of a contract shall be barred if not brought within ten years”, the period begins from the day when the “rights under the contract could be exercised”, ( The Civil Code of Ethiopia, Art. 1845 cum 1846, 1960)<sup>14</sup>note that invalidation includes both void and voidable contracts and have similar effect under Ethiopian law (The Civil Code of Ethiopia, Art. 1815 - 1818, 1960).<sup>15</sup> However, the division decided that the period of limitation provided under the civil code may not be applicable to invalidation of land sale, by reasoning out that sale of land is unlawful and as per article 1716 of the civil code a contract with unlawful object shall be of no effect.<sup>16</sup> As said earlier, the writer examined the position of the cassation division in light of two lines of

<sup>6</sup> The FDRE Constitution, cited above at note 1, Art. 80(3)(a)

<sup>7</sup> The Minutes of the council of Representatives of the Transitional Government of Ethiopia, May 4-25, (Unpublished, 1993) p. 253-256, Cited in Muradu Abdo, *Review of Decisions of State Courts Over State Matters by The Federal Supreme Court*, Mizan Law Rev., vol. 1, no. 1, 2007, p. 71.

<sup>8</sup> The FDRE Constitution, cited above at note 1, Art. 40(3)

<sup>9</sup> Ibid

<sup>10</sup> Rural Land Administration and Land Use Proclamation, 2005, Art. 7(1), Proc. No. 456, Fed. Neg. Gaz., year 11, no. 44. see also Sayeh Agegnehu, Detecting Urban Expansion and Land Tenure Security Assessment: The Case of Bahir Dar and Debre Markos Peri-Urban Areas of Ethiopia, Paper Prepared for Presentation at The World Bank Conference On Land and Poverty, **Washington DC, March 24-27, 2014, P. 3**

<sup>11</sup> The FDRE Constitution, cited above at note 1, Art. 40(4) & (5) and Rural Land Administration and Land Use Proclamation, cited above at note 10, Art. 5(1)(a)

<sup>12</sup> Dessalegn Rahmato, Land Policy in Ethiopia at Cross-roads. In Dessalegn (ed.) *Land Tenure and Land Policy in Ethiopia After The Derg*. Norway: Reprocentralen AVH. 1994, P. 12

<sup>13</sup> Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero, *The Enigma of Informal Rural Land Deals In Ethiopia: Evidence from Peri-urban Areas of Hawassa City*, Haramaya Law Review, Vol. 6 (2017): P. 44

<sup>14</sup> The Civil Code, cited above at note 3, Art. 1845 cum 1846

<sup>15</sup> Id. Art. 1815 through 1818.

<sup>16</sup> Please refer the following decisions:

Geta Trading P.L.C v. Commercial Bank of Ethiopia, Federal Supreme Court Cassation Division, File No. 43226, 07, 06, 2003 Eth.

arguments and discussed hereunder.

### 3. Arguments for and against the Position

Under this section of the writing the writer tries to sort out possible arguments for and against the decision.

To begin with arguments in favor of the decision, first it is better to examine whether the cassation declared the law as it is or interpreted the law, based on two grounds we may say that the decision is meant to declare the existing legal limitation on land sale. The first ground emanates from the prohibition of land sale under article 40(3) of the constitution and an act against the provision of the constitution have no effect (The FDRE Constitution, Art. 9(1), 1995),<sup>17</sup> therefore the decision of the cassation division resembles to reaffirming or asserting of what is provided under the supreme law of the state. The second ground is that the decision is endorsed by the House of Federation, the organ empowered to decide “all constitutional disputes” (The FDRE Constitution, Art. 62 & 83, 1995),<sup>18</sup> the house under its decision reasoned out that making the issue subject to period of limitation is against article 40(3) of the constitution (Kelebe Tesifa V. Ayelign Derebew, 2007 Eth. C.).<sup>19</sup> As discussed by Assefa Fiseha (Assefa Fiseha, 2007)<sup>20</sup> the House of Federation may be able to find out the true intention of the authors of the constitution, the nation nationalities.

The second argument in favor of the decision may emanate from the definitional element of article 39(5) of the constitution, it provides that nation nationalities or people means, inter alia, “a group of people who inhabit an identifiable, predominantly contiguous territory” (The FDRE Constitution, Art. 39(5), 1995),<sup>21</sup> by defining the nation nationalities in terms of territory the constitution made article 39 a bedrock of article 40(3), ownership of land as a manifestation of self-rule. Therefore, the ruling enabled the group to exercise its right without limitation.

The third reason is that the constitution prohibits self-eviction under article 40(3) through prohibition of land sale and this is not subject to period of limitation under the relevant laws of the state. The fourth argument may base itself upon the justification of protection of social interest, making actions on void contract subject to period of limitation will have undesirable effect on the wellbeing of the society. Writers also support that “mere lapse of time may not give efficacy to void contracts” (Jurado P. Desiderio, 1969)<sup>22</sup>, in other words “nullity is imprescriptible” (Marcel Planiol, 1939).<sup>23</sup>

We can also argue that allowing the applicability of prescription may result in a massive eviction of peasants and the displacement of pastoralists “moreover, ‘capitalist’ farmers who will alienate small peasants from their land.” (Gebru Mersha, 1998)<sup>24</sup> In addition to this, such decisions may be perceived as allowing of commodification of land, this in turn have the possibility to large-scale peasant evictions which forces them to migrate into towns” (Fantu Cheru, 1994).<sup>25</sup>

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C., The Ethiopian Federal Supreme Court Cassation Division decisions’ publication book. Vol. 12, p. 58

Abdela Ebrahim v. Uso Abide, Federal Supreme Court Cassation Division, File No. 79394, 06, 02, 2005 Eth. C., The Ethiopian Federal Supreme Court Cassation Division decisions’ publication book. Vol. 14, p. 201

Getinet Riko v. Jemela Ali, Federal Supreme Court Cassation Division, File No. 100671, 30, 11, 2007 Eth. C., The Ethiopian Federal Supreme Court Cassation Division decisions’ publication book. Vol. 18, p. 200

<sup>17</sup> The FDRE Constitution, cited above at note 1, Art. 9(1)

<sup>18</sup> Id. Art. 62 and 83

<sup>19</sup> Kelebe Tesifa V. Ayelign Derebew, the House of Federation, 4<sup>th</sup> round parliament, 5<sup>th</sup> Year, 2<sup>nd</sup> regular meeting, 18, 10, 2007 Eth. C.

<sup>20</sup> Assefa Fiseha, Constitutional Adjudication in Ethiopia: exploring the Experience of the House of Federation (HoF), Mizan Law Review, Vol. 1 No. 1 2007 P, 11

<sup>21</sup> The FDRE Constitution, cited above at note 1, Art. 39(5)

<sup>22</sup> Jurado P. Desiderio, *Commentary and Jurisprudence on Obligations and Contracts*, Rev. Ed. (Caloocan City: Philippine Graphic Arts Inc. 1969), p. 483-484

<sup>23</sup> Marcel Planiol, *Treatise On the Civil Law*, 12<sup>th</sup> ed. vol. 1 part. I, translated by Louisiana state law institute, 1939, p. 218

<sup>24</sup> Gebru Mersha, 1998, Privatisation of Rural Land: To Protect Whose Security? Paper Presented at the Inaugural Workshop of the Forum for Social Studies, Addis Ababa, September 18. P. 9 Cited in Yigremew Adal, Review of Landholding Systems and Policies in Ethiopia under the Different Regimes, EEA/Ethiopian Economic Policy Research Institute. December 2002, Working Paper No 5/2002, p. 26

<sup>25</sup> Fantu Cheru, 1994, Designing Structural Adjustment Program: Reconstruction, Rehabilitation, and Long-term Transformation, In

The second part of this section of the writing focuses on possible arguments that might be raised against the decision.

First, the parties in the decisions argued that the act they have done is contrary to the law and seek the invalidation of the act so as to be beneficial from the outcome. However, this line of argument is against the principle of *ex turpi causa non oritur actio* "from a dishonorable cause an action does not arise", a legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act.<sup>26</sup> On the other hand, there is a decision rendered by the Cassation Division which states that the land holder whose possession is deprived or interfered shall require the restoration of the possession prior to lapse of the period of limitation provided under article 1845 of the civil code (Shelema Negese v. Fayisa Mengistu, 2004 Eth.C.).<sup>27</sup> note that in this scenario there is no consent of the land holder but under sale agreement the consent is not vitiated, this decision leaves a doubt about reasonableness of the Cassation Division on the issue.

Second, as provided under article 89(5) of the constitution (The FDRE Constitution, Art. 89(5), 1995)<sup>28</sup> government is the holder of land on behalf of the people, this provision makes the government an agent of the people concerning land. This means government, as representative of the people, shall institute a legal action with interested party status (The Civil Code of Ethiopia, Art. 1808(2), 1990).<sup>29</sup> If it failed to do so, it is considered as the agent neglected its interest and we have to apply article 1845 of the code.

Third, why the constitution left the issue without express provision as provided under article 28 (1) that prohibits setting statute of limitation for crimes against humanity (The FDRE Constitution, Art. 28(1), 1995),<sup>30</sup> so we can say that making contracts of land sale imprescriptible is not the true intention of the law maker. Because, if the framers have had intent to make the issue imprescriptible it has been possible to expressly provide as made under the provision cited.

Fourth, the issue can be examined in light of comparison between article 15, the right to life, and article 40 (3), prohibition of land sale, of the constitution (The FDRE Constitution, Art. 15 & 40(3), 1995).<sup>31</sup> As discussed earlier, the Cassation Division decided that action for invalidation of land sale is imprescriptible and on the other hand the FDRE Criminal code provides that the right to prosecute and to enforce a penalty in respect of crimes of homicide may be barred by statute of limitation (Criminal Code of the Federal Democratic Republic of Ethiopia, Art. 8 cum 217, 2005),<sup>32</sup> and the accused can object by stating that the charge against him has been barred by limitation (Criminal Procedure Code of Ethiopia, Art. 130(2)(c) cum 131, 1961).<sup>33</sup> Therefore, it is not reasonable to argue the issue of land is untouchable and making it subject to period of limitation defeats the very object and value of the constitution.

Fifth, the decision of the court is against the purpose of statute of limitation, as discussed in *Natwest v Ashe* "the aim of the statutes of limitation is to prevent citizens from being oppressed by stale claims, to protect settled interests from being disturbed, to bring certainty and finality to disputes and so on" (*Natwest v Ashe*, 2008),<sup>34</sup> it reduces burden of courts by putting a limit on neglected actions (Lantera Nadew, 200),<sup>35</sup> recognizing period of limitation avoids serious disadvantage to the parties, that may emanate from loss of evidence, and lapse of time without action reveals tacit

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Abebe Zegeye and S. Pausewang (Eds.), *Ethiopia in Change: Peasantry, Nationalism and Democracy*, British Academic Press, 1994, p. 139-40

<sup>26</sup> <http://www.legal-glossary.org/2013/01/19/ex-turpi-causa-non-oritur-actio/> accessed on 29 May 2018

<sup>27</sup> Shelema Negese v. Fayisa Mengistu, Federal Supreme Court Cassation Division, File No. 69302, 20, 04, 2004 Eth.C., The Ethiopian Federal Supreme Court Cassation Division decisions' publication book. Vol. 13, P. 428 and 429

<sup>28</sup> The FDRE Constitution, cited above at note 1, Art. 89(5)

<sup>29</sup> The Civil Code, Cited above at note 3 Art. 1808(2)

<sup>30</sup> The FDRE Constitution, cited above at note 1, Art. 28(1)

<sup>31</sup> Id. Art. 15 and 40(3)

<sup>32</sup> Criminal Code of the Federal Democratic Republic of Ethiopia, 2005, Art. 8 cum 217, Proc. No. 414, Federal Negarit Gazeta, year 10, No. 58

<sup>33</sup> Criminal Procedure Code of Ethiopia, 1961, Art. 130(2)(c) cum 131, Proclamation No. 185, Nega.Gaze. (Extraordinary Issue), year 20, No. 1

<sup>34</sup> *Natwest v Ashe*, 2008, EWCA Civ 55 cited in Dov Ohrenstein, *Out of Time? Recent Developments in Limitation*, Radcliffe Chambers, Seminar Notes for HEALYS LLP, p. 1 available at:

[http://www.radcliffechambers.com/wp-content/uploads/2012/10/Out\\_of\\_](http://www.radcliffechambers.com/wp-content/uploads/2012/10/Out_of_) Accessed on 23 May 2018

<sup>35</sup> Lantera Nadew, *Void Agreements and Voidable Contracts: the need to elucidate ambiguities of their effect*, Mizan Law Review, Vol. 2 No. 1, 2008, p. 105

abandonment of claims by the other party (Corpus Juris Secundum, 1948).<sup>36</sup>

Sixth, there is uncertainty in the decisions of the Cassation Division. The Division by referring to article 1845 decided that the period of limitation provided under the civil code shall be applied to unlawful contract (Muna Endris et al. v. Development Bank of Ethiopia,

2002 Eth. C.)<sup>37</sup>, some may argue that article 2 of the federal courts proclamation allows the cassation division to render a different legal interpretation some other time (Federal Courts Proclamation, Art. 2(4), 2005).<sup>38</sup> However, such kind of inconsistency of interpretation creates high level of legal uncertainty in the judicial system, because the cassation division took only two years and five months (10 Ginbot 2002 Eth. C. to 06 Tikimit 2005 Eth. C. or 18 May 2010 to 16 October 2012) to make unlawful contract imprescriptible from subject of statute of limitation.

After all, let's agree that the cassation decision and the constitutional interpretation by the HoF is constitutional and reasonable, but what is the effect of the holding, does it have the ability to reinstitute the self-evicted party to his prior position after ten years. This is the concern of the succeeding section of the writing.

#### 4. The Practical Value of the Decision

The civil code provides reinstatement as an effect of invalidated contract (The Civil Code, Art. 1815(1), 1960).<sup>39</sup> Lantera Argues that upon invalidation of the void contract restitution based on article 1815-1818 shall be made because at least article 1676 of the civil code allows the application of provisions of contract to obligations regardless of their nature (Lantera Nadew, 2008),<sup>40</sup> this line of argument and article 1815 of the civil code has been supported by decision of the Cassation Division (Embet Derebew v Tadele Sedama, 2002, Eth. C.).<sup>41</sup> However, it is presumable that the informal buyer of the land will make improvement on the land and reinstitution may lead to serious disadvantage against him. The civil code provides that contract shall not be invalidated where the invalidation would involve serious disadvantage and inconvenience (The Civil Code of Ethiopia, Art. 1817(1), 1960).<sup>42</sup> Therefore, the decision of the Cassation Division may not have practical significance because of the fact provided, even the cassation division reaffirmed the provision in its decision (Embet Derebew v Tadele Sedama, 2002, Eth. C.).<sup>43</sup>

The parties are required to compensate expenses made in relation to invalidated contracts (The Civil Code of Ethiopia, Art. 1818, 1960);<sup>44</sup> on the other hand many of informal sellers of land have not economic capability to compensate the improvements made by the informal buyer upon the invalidation of the contract. This condition minimizes the practical value of the ruling.

Thirdly, such decision highly affects the economic efficiency of the land because a prudent man may hesitate to invest on a land that acquired through a contract which is subject to invalidation whenever the informal seller wants to have the land. This means the informal buyer shall wait until the seller and his legal heirs disappear once and forever so as to be sure about the status of his possession and to make major invest thereon.

Finally, the decision is unjust because it leads to eviction of the informal buyer who may live or his livelihood dependent on that particular land more than the informal seller, the result of the decision on imprescriptible action over invalidation of land sale is tantamount to judicial eviction to avoid self-eviction.

#### 5. Conclusion and Recommendation

The Cassation Division has declared that contract of land sale is unlawful and action for invalidation of the contract is imprescriptible. Under this paper we have noticed the possible arguments that might be raised for and against the

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<sup>36</sup> Corpus Juris Secundum, Limitation of Actions Vol. 53 (New York: American Law Book Co. 1948) at 901 cited in Lantera Nadew, cited above at note 35, p. 104

<sup>37</sup> Muna Endris et al. v. Development Bank of Ethiopia, Federal Supreme Court Cassation Division, File No. 48094, 10, 09, 2002 Eth. C., The Ethiopian Federal Supreme Court Cassation Division decisions' publication book. Vol. 10, p. 166

<sup>38</sup> Federal Courts Proclamation, cited above at note 1, Art. 2(4)

<sup>39</sup> The Civil Code, Cited above at note 3, Art. 1815(1)

<sup>40</sup> Lantera Nadew, cited above at note 35, p. 108

<sup>41</sup> Embet Derebew v Tadele Sedama, Federal Supreme Court Cassation Division, File No. 47800, 25, 06, 2002, 10 Eth. C., The Ethiopian Federal Supreme Court Cassation Division decisions' publication book. Vol. 10, p. 141

<sup>42</sup> The Civil Code, Cited above at note 3, Art. 1817(1)

<sup>43</sup> Embet Derebew v Tadele Sedama, cited above at note 41, p. 142

<sup>44</sup> The Civil Code, Cited above at note 3, Art. 1818

decision and the practical value of the decision.

By considering practical values and enforceability of the decision, the value question between land and other issues that made subject to statute of limitation, fairness of the decision, and to increase the efficiency of the land, the legislator shall come up with a law that can clearly regulate whether the period of limitation provided under the civil code is applicable to cases concerning land sale or not. If the legislature insists on making the issue imprescriptible, it is recommended to let the person whose livelihood is dependent on the land in question to remain the holder thereof or if the informal seller has other means of livelihood or land in other area of the state the courts should declare the applicability of the period of limitation. The exceptions provided may help to ensure the implementation of social justice and economic efficiency that intended to be achieved through the land use and administration policy of the country.

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